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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

GINBINEH T. AYELE, Plaintiff and Appellant, v. KAISER FOUNDATION HEALTH PLAN, INC., et al., Defendants and Respondents.	A110691 (San Francisco County Super. Ct. No. 404360)
GINBINEH T. AYELE, Plaintiff and Appellant, v. GENEVA PHARMECEUTICALS, INC., et al., Defendants and Respondents.	A111346 (San Francisco County Super. Ct. No. 404359)

INTRODUCTION

Plaintiff Ginbineh T. Ayele, in propria persona, appeals from orders of the San Francisco Superior Court entering judgment against him and in favor of defendants Permanente Medical Group, Inc., Kaiser Foundation Hospitals and Kaiser Foundation Health Plan, Inc. (collectively Kaiser) in superior court cases No. 404360 and No. 404359. These judgments were entered based upon an arbitration award against appellant and in favor of Kaiser. We shall conclude that having failed to challenge the arbitrator's award within the 100-day period provided by Code of Civil Procedure

section 1288[1] for vacating an arbitration award, appellant may not challenge it on appeal. We therefore shall affirm the judgment.

PROCEDURAL BACKGROUND

On February 7, 2002, plaintiff filed a complaint (Super. Ct. S.F. City and County, 2002, No. 404360) against various Kaiser defendants alleging medical malpractice in connection with the prescription of Haloperidol. On June 3, 2002, Kaiser petitioned to compel arbitration of plaintiff's claims. On July 26, 2002, the trial court entered an order granting Kaiser's petition.

Also on February 7, 2002, plaintiff filed a separate action for product liability against Geneva Pharmaceuticals, Inc. (Geneva), the manufacturer of Halperidol. (Super. Ct. S.F. City and County, 2002, No. 404359). Geneva demurred to the complaint and plaintiff requested leave to amend the complaint in case No. 404359 to substitute Kaiser Foundation Health Plan, Inc. as a Doe defendant. The amendment was filed on August 9, 2002.

Pursuant to the trial court's order granting arbitration of plaintiff's claims as to Kaiser, the Office of the Independent Administrator (OIA) appointed retired judge Allan J. Bullhoffer as arbitrator.

In December 2002, Kaiser moved to stay the product liability action in case No. 404359 as to Kaiser, pending the arbitration in case No. 404360, because the claims as to Kaiser were the same: that Kaiser wrongfully treated the plaintiff with Haloperidol. On March 18, 2003, the superior court entered an order granting Kaiser's motion to stay on condition that plaintiff be allowed to prosecute his product liability claim against Kaiser in the same arbitration as his malpractice claims. Meanwhile, by order entered February 21, 2003, the trial court granted summary judgment to Geneva in case No. 404359.

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1 All statutory references are to the Code of Civil Procedure unless otherwise indicated.

In March and April 2003, Kaiser filed and served a summary judgment motion in the arbitration.

After the trial court ordered arbitration of plaintiff's product liability claims as to Kaiser, the OIA sometime after May 19, 2003, consolidated the arbitration of these claims with the pending arbitration of the medical malpractice claims. After several continuances, hearing on the summary judgment motion in the arbitration was held on July 18, 2003.

The arbitrator's July 23, 2003 order granting Kaiser's motion for summary judgment stated the motion was granted on "each and every ground stated in the Motion," including that plaintiff had failed to disclose an expert to substantiate his claims. The arbitrator also made clear that it was ruling on both the medical malpractice and product liability claims, specifically finding that "the facts [plaintiff] relies on for his product liability claim are the same facts he relies on for his negligence claim. The law is clear that [Kaiser] Respondents have no liability as the 'sellers' of the drugs that were prescribed to the [plaintiff] in the course of providing medical services. The consolidation of the two claims in arbitration was, therefore, appropriate as they arise out of the same set of facts and there is no separate liability of [Kaiser] Respondents under the product liability claim."

On July 23, 2003, the arbitrator signed a judgment in favor of Kaiser.[2] On July 31, 2003, Kaiser filed a notice of order granting motion for summary judgment and a notice of judgment in the superior court, serving the same on plaintiff referencing both consolidated actions.[3]

Plaintiff did not file a petition in the superior court to vacate the arbitrator's award within the 100 days provided by section 1288. However, on September 16, 2003, plaintiff filed a notice of appeal from the arbitrator's order and judgment in cases

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[2] The caption on this judgment referenced only case No. 404360.

[3] On November 17, 2004, at Kaiser's request, the arbitrator signed a judgment referencing both case No. 404360 and case No. 404359.

No. 404360 and No. 404359. In an unpublished opinion filed January 6, 2004, we held the appeal was an attempt to appeal from a nonappealable arbitrator's award and so dismissed the appeal. (*Ayele v. Kaiser Foundation Health Plan, Inc.* (Jan. 6, 2004, A104044 [nonpub. opn.].)

After the appeal was dismissed, the superior court began setting continuing case management conferences and issuing orders to show cause why Kaiser had not obtained judgment and entry of judgment after the arbitrator's award. On April 28, 2005, Kaiser moved for entry of judgment in each of the actions. (Kaiser asserts that it was required to move separately because the superior court had not consolidated the actions.) Plaintiff opposed these motions, filing opposition in case No. 404360 on May 16, 2005, and in case No. 404359 on June 9, 2005. In connection with his opposition to entry of judgment in these actions, plaintiff stated that he was seeking to vacate the arbitrator's award and referenced the statutes providing for vacating an arbitration award.

The trial court granted Kaiser's motions, ordering judgment to be entered and entering judgment in each action. Judgment was entered in case No. 404360 on October 27, 2005, pursuant to the order for entry of judgment entered June 2, 2005, and in case No. 404359 on November 15, 2005, pursuant to the order for entry of judgment entered July 25, 2005.

Plaintiff filed notices of appeal in case No. 404360 on June 9, 2005 (amended June 14, 2005), and in case No. 404359 on August 10, 2005. We ordered the appeals consolidated.[4]

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[4] On November 2, 2005, we denied appellant's request for findings of fact and deferred ruling upon appellant's request for judicial notice until decision on the appeal. On June 16, 2006, we deferred ruling upon Kaiser's request for judicial notice (Evid. Code, § 452) and alternate motion to take additional evidence under section 909. We hereby deny the requests for judicial notice of both appellant and Kaiser and deny Kaiser's alternative request that we take additional evidence pursuant to section 909.

DISCUSSION

In a brief that is often incomprehensible, plaintiff appears to argue that the arbitration award should be vacated because it does not comply with the superior court's order that both cases be arbitrated together insofar as they involved Kaiser; that the superior court exceeded its authority by granting Kaiser's separate motions for entry of judgment and that Kaiser delayed these motions in order to prejudice him; that Kaiser waived arbitration by failing to follow contractual and court requirements; that Kaiser violated OIA rules by failing to jointly select the neutral arbitrator as permitted by OIA rule 17; and that he never received the list of possible arbitrators and evaluations in the product liability action (case No. 404359). He further argues the arbitrator should have been disqualified because he failed to make disclosures required by section 1281.9, that the arbitrator was biased because he served as a neutral arbitrator in other Kaiser cases, and that the arbitrator failed to grant plaintiff's multiple requests for continuances.

Although these claims appear to be without merit, we do not reach them, because plaintiff's failure to timely petition the superior court to vacate the arbitration award is fatal to his maintaining of this appeal.

The arbitrator granted summary judgment on July 23, 2003, and the award was filed on that date. Notice of the award, referencing both cases, was served on appellant on July 31, 2003. Appellant failed to move the superior court to vacate or correct the award within the 100-day period specified in section 1288. Instead, he attempted to appeal to this court from this nonappealable order.

Section 1288 provides: "A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award *shall be served and filed not later than 100 days* after the date of the service of a signed copy of the award on the petitioner." (Italics added.)

A party who fails to timely petition to vacate an arbitration award under section 1288 cannot appeal from a judgment confirming the award or entering judgment on grounds that would have supported an order to vacate the award. (*Knass v. Blue Cross of*

California (1991) 228 Cal.App.3d 390, 393-396 (*Knass*); accord, *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 658-660 (*Louise Gardens*); *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1010; 15 Couch on Insurance (3d ed. 2005) § 213:25 & fn. 32; pp. 213-36 to 213-37; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 2:184, p. 2-99.)

In *Louise Gardens, supra,* 82 Cal.App.4th 648, the court refused to allow an appellant to circumvent the 100-day requirement by moving to *confirm* the award outside the 100-day period in order to secure an appeal in which the appellant's objections could be raised. The court said: "A party to an arbitration may seek to vacate or correct the award or to have it confirmed. (§ 1285.) Upon a petition seeking any of those results, the court *must confirm* the award, *unless* it either vacates or corrects it. (§ 1286.)[5]" (*Louise Gardens*, at p. 658.) "A court may not vacate an award unless a petition requesting such relief has been duly filed and served (§ 1286.4, subd. (a)) not later than 100 days after the date of service of a signed copy of the award upon the petitioning party. (§ 1288.)" (*Louise Gardens*, at p. 658.)

"A party who fails to timely file a petition to vacate under section 1286 may not thereafter attack that award by other means on grounds which would have supported an order to vacate ([*Knass, supra*,] 228 Cal.App.3d [at pp.] 393-396.) In *Knass*, the insured had sued his medical insurer and the matter had been submitted to binding arbitration. After the award was issued, the insured did not petition the court to vacate the award within 100 days after it was served, but later filed an appeal from the postconfirmation judgment. The court held that 'Knass waived his opportunity to challenge the award by

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[5] "Section 1286 provides: 'If a petition or response under this chapter is duly served and filed, the court *shall confirm the award* as made, whether rendered in this state or another state *unless* in accordance with this chapter *it corrects the award* and confirms it as corrected, vacates the award or dismisses the proceeding.' (Italics added.)" (*Louise Gardens, supra,* 82 Cal.App.4th at p. 658, fn. 16.)

allowing the 100-day period to expire. The fact the award was reduced to a judgment does not resurrect his opportunity to challenge it.' (*Id*. at p. 394.)

"The *Knass* court explained its reasoning in the following terms: 'In order to comply with the purpose of expeditious resolution of disputes through arbitration, time limits in which to challenge arbitration awards must be strictly enforced. [Citations.] Permitting a party to wait until after judgment to challenge an award would undermine the purpose of arbitration proceedings—to resolve disputes quickly. The requirement that a petitioner challenge an award within the 100-day limit "places a burden upon those who would attack the award to act promptly or acquiesce in its enforcement." [Citation.].' ([*Knass*]*, supra,* 228 Cal.App.3d at p. 395.) [¶] Applying the principles of statutory construction which we have summarized above, the *Knass* court concluded: 'Although section 1287.4 allows an appeal from a judgment confirming an arbitrator's award, we find no indication that the section contemplates allowing a party to bypass the procedures which provide for limited review by the superior court. . . . [¶] The arbitration statute is clear. A party to an arbitration proceeding must challenge an award under section 1288 by a petition to vacate or correct the award within 100 days of service of the award. An appeal of the judgment confirming the award may not be used to circumvent the prescribed time allowed to petition for vacation or correction of award.' ([*Knass*]*, supra,* 228 Cal.App.3d at pp. 395-396; see also *Davis v. Calaway* (1975) 48 Cal.App.3d 309, 311.)" (*Louise Gardens, supra,* 82 Cal.App.4th at pp. 659-660, fn. omitted.)

"While it is true that no appeal would lie until a judgment had been entered, such a judgment would have followed from a denial of the [plaintiff's] petition to vacate." (*Louise Gardens, supra,* 82 Cal.App.4th at p. 660, fn. omitted.)

Plaintiff has failed to demonstrate that his objections could not have been raised in a petition to vacate the award. Consequently, we must conclude that plaintiff's failure to timely move to vacate the arbitration award in the superior court, prevents him from challenging the award on this appeal.

DISPOSITION

The judgment is affirmed. Kaiser is entitled to its costs on appeal.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.